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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EZELL HOLIDAY,

Defendant and Appellant.

D058982

(Super. Ct. No. SCN275896)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Affirmed.

A felony complaint was filed charging Ezell Holiday with corporal injury on a spouse, while personally using a deadly weapon and causing great bodily injury (Pen. Code, §§ 273.5, subd. (a), 1192.7, subd. (c)(8), (23); count 1), and assault while personally using a deadly weapon (Pen. Code, §§ 245, subd. (a), 1192.7, subd. (c)(23); count 2). A domestic violence criminal protective order was issued the same day prohibiting Holiday from contacting or being within 100 feet of the victim, B.H., and her boyfriend, K.H., for three years.

After the court denied Holiday's motion to set aside the information, Holiday pled guilty to count 2, felony assault, and his remaining domestic violence charge and allegations were dismissed with a *Harvey*¹ waiver.

At sentencing, the court granted Holiday probation, with 381 days of custody, and, over Holiday's objection, imposed the condition that he "[p]articipate in electronic monitoring, specifically Global Positioning System (GPS) to monitor your location if directed by [the probation officer]." Additionally, without objection by Holiday, the court executed a domestic violence criminal protective order prohibiting Holiday from contacting or being within 100 feet of B.H. and K.H. for three years.

On appeal, Holiday asserts the court erred by imposing the probation condition that he submit to GPS tracking as it was not reasonably related to the current offense nor designed to serve any other purpose. We affirm.

FACTUAL BACKGROUND²

In February 2010 Holiday and B.H., who had been married for two years, were separated and Holiday was to move out of their home. Before he moved out, Holiday became angry with B.H. and attacked her. The two had been arguing and B.H. told Holiday that she wanted to leave so everyone could calm down. Holiday told her that she was not going anywhere and when she tried to leave he pushed her onto a bed and tried to choke her. B.H.'s two children and Holiday's nephew ran in and made Holiday get off

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

² Because Holiday pled guilty, the factual background is taken from the preliminary hearing transcript and probation report.

B.H. However, when B.H. again tried to leave, Holiday pulled out a knife and again told her she was not leaving. In the end, Holiday did not use the knife and thereafter moved out of the family home.

On April 14, 2010, K.H. moved in with B.H. On April 17, 2010, when B.H., K.H., and several friends were returning from a restaurant where they had taken B.H.'s children, they encountered Holiday, waiting outside B.H.'s home, with his hands behind his back.³ Holiday complained that B.H. was not returning his calls. B.H. told him that no one wanted to talk to him at the moment, and they were not going to have an argument right there. Holiday strode towards B.H. aggressively, and B.H. raised her hand to his chest to ward him off. Holiday pulled a knife approximately two feet long from behind his back and struck B.H. on her arm. B.H. thought Holiday was trying to "go for" K.H. when he struck her.

K.H., who had been behind B.H., saw Holiday wielding the knife and started to back up. Holiday had previously sent K.H. threatening letters to the effect that he needed to back off or "somebody was going to get hurt," "somebody wasn't going to survive." After Holiday cut B.H, he chased K.H. away with the knife. Holiday fled when police arrived.

B.H. had to be hospitalized to have surgery for a partially severed artery, nerve and tendon. As of January 2011, B.H. continued to suffer nerve damage, having no feeling in three of her fingers.

³ The events on April 17, 2010, served as the basis for the charges in this case.

DISCUSSION

Holiday contends the court abused its discretion and violated his "basic" constitutional rights by requiring as a condition of probation that he participate in electronic monitoring via GPS if directed by his probation officer as it does not reasonably relate to his assault conviction. We reject this contention.

A. Background

Following Holiday's guilty plea and in preparation for sentencing, the probation department prepared a probation report, wherein the probation officer recited an interview with B.H.: "She feels the defendant may try to cause her physical harm upon his release stating, 'If I could afford to move, I would have moved already. Even my children are afraid; the girls are having nightmares and are sleeping in bed with me. He might come around to see his nephew, Larry James, who still lives with me. He is not on the protective order.' [B.H.] expressed concern that the defendant has nowhere to go upon his release and may resort to stalking her."

The probation officer recommended GPS monitoring as a condition of probation: "The probation officer is quite concerned . . . for [B.H.] and her family's safety after reflecting on the defendant's despondent attitude during his probation interview. The defendant scored in the high-risk category on the Spousal Assault Risk Assessment. The undersigned believes GPS conditions might be a useful tool for probation supervision in considering the circumstances of this case and will be recommended."

At the sentencing hearing, Holiday objected to the GPS monitoring condition as insufficiently related to an assault conviction. The prosecutor argued in support of the

GPS condition, agreeing with the probation officer's concern about the fact that Holiday would be transient upon his release, the threat he posed to B.H., and his despondent mental condition.

The court decided to impose the condition, stating, "I'm going to impose it and here's why: This is a domestic violence offense. There's a stay-away order that the defendant not have contact, direct or indirect, nor come within one hundred yards of the protected persons' home, or person, or car. The GPS device might serve as evidence if he does violate."

B. Analysis

Under Penal Code section 1203.1, a court granting probation may impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer" (Pen. Code, § 1203.1, subd. (j).) "The primary goal of probation is to ensure '[t]he safety of the public . . . through the enforcement of court-ordered conditions of probation.' " (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).)

"The trial court's discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute." (*Carbajal, supra*, 10 Cal.4th at p. 1121.) Accordingly, our Supreme Court has "interpreted [] section 1203.1 to require that probation conditions which regulate conduct 'not itself criminal' be

'reasonably related to the crime of which the defendant was convicted or to future criminality.' " (*Ibid.*)

"Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, *and* (3) requires or forbids conduct which is not reasonably related to future criminality.' " " (*People v. Olguin* (2008) 45 Cal.4th 375, 379, italics added.) Consequently, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at p. 380.)

"As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or ' " 'exceeds the bounds of reason, all of the circumstances being considered.' " ' " (*Carbajal, supra*, 10 Cal.4th at p. 1121.)

Here, the court did not abuse its discretion in ordering that Holiday submit to GPS monitoring as a condition of probation. First, this condition is related to the crime Holiday pled guilty to. Holiday asserts it is not because he pled guilty only to the assault charge and not the domestic violence charge. However, Holiday ignores the fact that the domestic violence charge was dismissed pursuant to a *Harvey* waiver and was therefore subject to the court's consideration in imposing conditions of probation. (*People v. Hume* (2011) 196 Cal.App.4th 990, 995-996.) Moreover, the circumstances of the assault to which he pled guilty show that it involved domestic violence.

Further, in assessing the extent to which the probation condition relates to noncriminal conduct, the condition imposed in this case was reasonable. Holiday may never have to wear a monitoring device unless his probation officer requires it because he is violating the stay-away order or is in danger of doing so. Moreover, if Holiday is required to wear a monitoring device, it will not disturb or disrupt any noncriminal activities. Further, as we shall discuss, *post*, the condition is appropriate even though it involves conduct that is not itself criminal, it is reasonably related to preventing future criminality. (*People v. Olguin*, *supra*, 45 Cal.4th at p. 380.)

Holiday contends that the GPS monitoring condition will interfere with his ability to obtain employment. However, he does not explain how or why it would have such an impact. Wearing the monitoring device will only alert law enforcement officers to his location should he violate the law or his probation conditions. Further, this condition is not overly restrictive and is less invasive than conditions such as warrantless searches that have been upheld as reasonable. (See *People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Balestra* (1999) 76 Cal.App.4th 57, 65-67.)

Finally, the GPS condition serves as a deterrent to future criminal conduct. Holiday's knowledge that law enforcement will know his location may dissuade him from committing further domestic abuse. For the same reason, it should deter him from violating the stay-away order.

It should also be noted that probation is a privilege and if "the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*In re Bushman*

(1970) 1 Cal.3d 767, 776, overruled on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.)

In sum, the court did not abuse its discretion by ordering GPS monitoring as a condition of Holiday's probation.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.